IN THE

Supreme Court of the United States

October Term, 1952. No. 167.

UNITED STATES OF AMERICA,
Appellant,

v.

JOSEPH KAHRIGER.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

APPELLEE'S PETITION FOR REHEARING.

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Appellee on the grounds following, petitions for a rehearing of this Court's judgment:

1. The willful failure to register for the special occupational tax even if constitutional is not a criminal offense. Count II of the information does not charge a criminal offense since under the Act the willful failure to register is not a crime. Count II states (R. 2):

> "* * * Joseph Kahriger did engage in the business of accepting wagers and did accept wagers as defined in 26 U. S. C. Section 3285 and has willfully failed to register for the special occupational tax as required by

26 U. S. C. Section 3291, in violation of 26 U. S. C. Section 3294 and 2707 (b)."

But a willful failure to register is not made a crime under the statute. 26 U. S. C. (Supp. V) Section 3291 states:

> "Each person required to pay a special tax under this sub-chapter shall register with the Collector of the district."

26 U. S. C. (Supp. V) 3294 entitled Penalties, in paragraph (a) penalizes the failure to pay the tax. In paragraph (b) penalizes the failure to post or exhibit the stamp. Paragraph (c) dealing with willful violations reads:

> "The penalties prescribed by Section 2707 with respect to the tax imposed by Section 2700 shall apply with respect to the tax imposed by this subchapter."

Since no criminal penalties are provided for in the "Wagering Act" for *failure to register*, only for failure to post the stamp or pay the tax, Count II does not state an offense. This Court should affirm the order of dismissal on the ground that Count II of the information does not state a criminal offense. See *United States v. CIO*, 335 U. S. 106 (1948).

2. Statute misread. This Court has erroneously stated that "the wagering tax which we are here concerned applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law." 26 U. S. C. (Supp. V) Section 3285 (e) excludes from tax, wagers of all persons if licensed under state law. In *U. S. v. Constantine*, 296 U. S. 287, the fact that the $1,000.00 license tax applied to a local activity, control over which was reserved to the states by the Tenth Amendment, was proved by the reference in the statute there involved—as

here—to activities made illegal by state law.[1] The statutes[2] cited by this Court imposing taxes on colored oleomargarine, narcotics, firearms and marihuana, and lottery tickets and retailing liquor apply to *all* persons engaged in the business *with no exclusion from tax if state licensed.*

3. Erroneous rule applied. This Court stated that "Under the registration provisions of the wagering tax appellee is not compelled to confess acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

But if Appellee acknowledged being engaged in any business that is unlawful, that fact would be relevant to prove that he had previously been engaged in that business. See *Johnson v. U. S.*, 318 U. S. 189, 195-196. If therefore the proceeds of that business had not been previously reflected in his records or returns he could not possibly answer questions relating to that business without incriminating himself under Section 145 (c) or Section 3809 (a) of the Internal Revenue Code. And as the Court in *Healey v. U. S.*, 186 F. 2d 164 (C. A. 9), said "what a lead to the Federal Bureau of Investigation to investigate the details of the relationship" an affirmative answer would give.

Under subchapter B, 26 U. S. C. 3290, it is provided that "A special tax of $50 per year shall be paid by each person

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[1] This Court stated "Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." Linder v. United States, 268 U. S. 5; and Trusler v. Crooks, 269 U. S. 475 were not overruled but soft pedaled in a minor key with a footnote, "but see."

[2] This Court stated "But regardless of its regulatory effect the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid." What is disregarded was Commissioner of Internal Revenue John B. Dunlap's statement to the Senate Finance Committee of the cost of collection (Appellee's Br. 35).

who is liable for tax under subchapter A or *who is engaged* in receiving wagers for or on behalf of any person so liable" (emphasis added).

Thus no one need pay, nor is liable for, the special $50 tax unless he has already become liable for the 10% excise tax, either personally or through his principal.

Regulation, Section 325.25 provides that:

> "(a) The tax attaches when (1) a person engages in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor. In the case of a wager on credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor."

Obviously no person "is liable for" the tax until he has participated in such a gambling transaction either as principal or agent. Once he has participated and has become liable for the tax, and the duty of keeping daily records and paying the tax, it seems clear that to require him then to pay a special tax which would be an acknowledgment that he was liable for the excise tax, or to file a registration statement, which would also be an acknowledgment of his liability to pay the excise tax, for his past conduct, is to require him to be a witness against himself, since liability to pay the excise tax is a link in the chain of evidence necessary to be made out to subject him to the penalty for nonpayment, or for failure to keep daily records.

The payment of the tax, registration, and the furnishing of information required by the Act could have incriminated Appellee under several federal statutes.

By paying the anti-gambling tax, defendant would confess that he is a "person who is engaged in the business of accepting wagers" or a "person who conducts any wagering pool or lottery." Section 3285 (d). This would be an admission of an essential element of the crimes prohibited

by the lottery statutes. Admissions of essential elements of crime are the strongest form of self-incrimination. See *United States v. Weisman*, 111 F. 2d 260 (2d Cir. 1940).

Furthermore, Section 3291 of the Wagering Act requires that the names and addresses of all employees be furnished to the Collector (now the Director). Registrants must supply all requested information to obtain the tax stamp, Form 11-C, Instructions, par. 4; moreover, Appellee could not refuse to give the employee list and force issuance of the stamp by court order. *Combs v. Snyder*, 101 F. Supp. 531 (D. C. 1951), aff'd 342 U. S. 939 (1952). Such a list in itself would furnish proof of violations of the social security and withholding tax laws. Accord, *Greenberg v. United States*, 192 F. 2d 201 (3d Cir. (1951)), rev'd 343 U. S. 918 (1952). In addition the list required would furnish the Federal Government with a list of witnesses that could be used against the Appellee in any prosecution here outlined. This is per se incriminating. *United States v. St. Pierre*, 132 F. 2d 837, 838 (2d Cir. 1942).

The payment of the tax and registration could also incriminate Appellee under the bribery and conspiracy laws, for they could form links in a chain of evidence to be later used against him. *Hoffman v. United States*, 341 U. S. 479 (1951). To plead the privilege it is not necessary for the admission directly to incriminate the Appellee. This rule was made most clear in *Greenberg v. United States*, 187 F. 2d 35 (3d Cir.) ordered reconsidered, 341 U. S. 944, reconsidered 192 F. 2d 201 (3d Cir. 1951), rev'd per curiam, 343 U. S. 918 (1952), where the defendant, pleading possible incrimination under federal tax laws, refused to reveal what his business was or whom he knew in the numbers racket. His contempt conviction was reversed by the Supreme Court on the authority of *Hoffman v. United States*, supra, even though no facts were shown that the defendant's business was illegal under federal law.

Given the name and address of the defendant from the public rolls (required by Section 3275), a federal prosecu-

tor would have an important piece of evidence to prove the existence of a conspiracy to violate any law of the United States, especially one of those here enumerated. Since much less need be proved for a conspiracy than for a substantive federal crime, an inference of possible incrimination is more readily drawn.

Therefore, judicial notice should be taken of the defendant's business, background, and the circumstances under which he is asked for information in order to judge the validity of the self-incrimination plea. *Hoffman v. United States*, 341 U. S. 479 (1951).

Since the Act as construed requires under penalty of law that the Appellee surrender self-incriminating information as the condition of obtaining the stamp tax, and punishes failure to obtain the stamp tax, it clearly violates the Fifth Amendment.[3] *Cf. Morgan, The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 37 (1949); *People v. McCormick*, 228 P. 2d 349 (App. Dept. Sup. Ct., L. A. Cty., Cal. 1951).

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[3] This Court has applied a rule likely to plague it and the criminal law in cases to come, in saying: "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.[13]" The cases cited in the footnote are inapplicable here. In Davis v. United States, 328 U. S. 582, 590; and Shapiro v. United States, 335 U. S. 1, 35, the Federal Government had the power under the Price Control Act to regulate the business and require records to be kept in order that there might be information of transactions which are the appropriate subjects of government regulation. In E. Fougera & Co. v. City of New York, 224 N. Y. 269, 281, 120 N. E. 692, the business was subject to government regulation and therefore the State could impose conditions on the right to engage in that business.

CONCLUSION.

Filing a Petition for rehearing is like courting a girl that is in love with someone else, but it is sometimes done for her own good.

Respectfully submitted,

JACOB KOSSMAN,
Counsel for Appellee.

CERTIFICATION.

The foregoing Petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

JACOB KOSSMAN,
Counsel for Appellee.

March, 1953.